

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN HOUGHTON BEACH,

Defendant-Appellant.

UNPUBLISHED

March 16, 2006

No. 256367

Genesee Circuit Court

LC No. 03-012302-FC

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life without parole for the murder conviction and two to five years for the CCW conviction, those sentences to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Jacob ("Jack") Midler at Midler's business, Reno's Auto Parts. Defendant claimed self-defense. The evidence at trial was that defendant and Midler knew each other, because defendant had worked for Midler occasionally on a contract basis. Shortly before the shooting, defendant and Midler had a disagreement; defendant had performed work for Midler and the two disagreed on how much Midler still owed defendant. On the day of the shooting, witnesses saw defendant's brown van parked near Midler's business. The license plate was covered with cardboard. After the close of business, as Midler was leaving, the van drove into the parking lot and approached Midler. A witness and employee of Midler's, Fred Radnoti, saw that the driver was wearing a ski mask. As Midler turned to walk away from the van, the driver produced a gun and shot Midler in the head. After a brief pause, the driver shot Midler a second time in the head, causing Midler to fall to the ground, and the van drove off. Midler died from two gunshot wounds to his head, which were both fired from close range. According to Radnoti, Midler did not have a weapon, and Radnoti did not see Midler put his hands on the driver of the van or reach for anything as he was talking to the driver. Testimony indicated that the police arrived within five minutes after Midler was shot. They did not discover any weapon in Midler's possession.

Defendant gave a statement to the police in which he admitted shooting Midler, but claimed that he acted in self-defense. According to defendant, he and Midler were arguing about

money when Midler remarked that he had something for defendant and then began to reach into his coat. Defendant claimed that he thought Midler was reaching for a gun and was going to kill him, so defendant pulled out his own gun and shot Midler. Defendant admitted that he never actually saw Midler with a gun.

We first address defendant's argument that the prosecutor improperly introduced evidence that Midler did not carry a gun and had a peaceful nature before defendant presented evidence of Midler's aggressive character. Because defendant did not object to this evidence below, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000).

Where there is evidence that the alleged victim had a character trait for aggression or was the first aggressor, the prosecution may offer evidence in rebuttal to show that the victim had a character trait of peacefulness. MRE 404(a)(2). Here, the prosecutor's introduction of evidence of Midler's peaceful character was premature, because defendant had not yet presented any evidence of Midler's character trait for aggression. *People v McIntosh*, 62 Mich App 422, 429; 234 NW2d 157 (1975), *aff'd in part and rev'd in part on other grounds* 400 Mich 1 (1977). But because defendant later introduced evidence of Midler's character for aggression and that he carried a gun, the prosecution's evidence would have been admissible on rebuttal. Therefore, the evidence of Midler's peaceful character and dislike of guns, although premature, did not affect defendant's substantial rights. Reversal is not required.

Defendant further argues that the trial court abused its discretion when it excluded a defense witness's testimony that it was generally known in the community that Midler carried a gun. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

At trial, defense counsel argued that the testimony was relevant to defendant's state of mind. The trial court sustained the prosecutor's objection to the single question whether in the course of her dealings with Midler's business "was it common knowledge that Jack Reno [sic Midler] carried a gun?" after the witness had responded "yes." The court sustained the objection because there was no evidence that defendant himself was aware of Midler's reputation for carrying a gun. However, the witness had already testified that she worked at a business near Midler's, that her business had a lot of the same clientele, that she had been to Midler's business at least thirty or forty times, and that she had seen Midler have an altercation with a customer and show the customer that he was carrying what appeared to be a gun in his belt.

As a general rule, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." MRE 404(a). An exception exists regarding the character of a homicide victim when self-defense is at issue. MRE 404(a)(2). When a defendant claims self-defense, "[t]he reputation of the deceased for a violent or turbulent disposition is a circumstance that would cause such a belief," and the deceased's "habitual carrying of weapons or his possession of them at the time of the affray, if known to the defendant, should be considered as properly affecting his apprehensions." *People v Harris*, 458 Mich 310, 316-317; 583 NW2d 680 (1998). See also *People v Dunn*, 233 Mich 185, 193; 206 NW 568 (1925) (a defendant has the right to introduce "testimony tending to show that deceased's reputation and character were bad, that he was

known as a gunman and had made threats against defendant and others, and that the latter knew it”). Here, the trial court determined that Midler’s reputation for carrying a gun was not admissible to show defendant’s state of mind unless defendant had knowledge of that reputation. *Harris, supra* at 316-317. While a correct statement of the law, the court’s ruling failed to recognize that because the prosecution had introduced evidence of Miller’s peacefulness and that he was known not to carry a gun, the prosecution had opened the door to this issue. Thus, the trial court erred in sustaining the prosecution’s objection. However, we conclude that defendant’s substantial rights were not affected, because the witness had already provided testimony addressing the issue.

Defendant argues in a supplemental brief filed in propria persona that he should not have been bound over on the charge of open murder, and that evidence of provocation was withheld at both his preliminary examination and at trial. We find no merit to these issues. There was ample evidence to establish that a murder was committed and probable cause to believe that defendant committed it. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). The determination of the degree of the crime was a matter for the jury. MCL 750.318. Therefore, defendant was properly bound over on the charge of open murder. *Northey, supra*.

Further, the record does not support defendant’s argument that evidence of an injury to his hand was improperly withheld from the jury. The evidence of that injury appears in defendant’s recorded police statements, and those statements were played to the jury, which also received a transcript of the statements. Thus, there is no merit to this issue.

Finally, defendant claims that trial counsel was ineffective. Because no *Ginther*¹ hearing was held, our review is limited to mistakes apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on the defendant to show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Defendant contends that counsel was ineffective for not calling two witnesses who could have testified that Midler regularly carried a gun. The failure to call witnesses will not be considered ineffective assistance unless it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Here, counsel’s failure to call the witnesses in question did not deprive defendant of a substantial defense because other testimony was presented that Midler regularly carried a gun. Thus, the witnesses’ testimony would have been cumulative to that already presented at trial.

Defendant also suggests that counsel was ineffective for failing to present evidence of defendant’s “injury” and state of mind to the jury, and for failing to obtain a jury instruction that Midler had a reputation for cruelty or violence. In his police statements, defendant minimized the importance of the “injury” to his knuckle. To the extent the injury was significant, however,

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

evidence of that injury was presented to the jury through defendant's recorded statements, which were played for the jury. There was no evidence to support that Midler had a reputation for cruelty or violence, even assuming that he carried a gun and was verbally aggressive. Defendant has not established that defense counsel made errors so serious as to deprive him of a fair trial.

Affirmed.

/s/ Helene N. White

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder